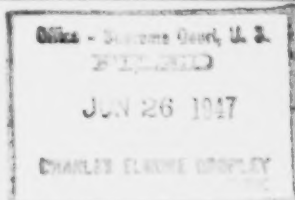


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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 155

GEORGE M. BOURQUIN,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CLAIMS AND BRIEF IN SUPPORT
THEREOF.

† GEORGE M. BOURQUIN,

In pro per.

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SUPREME COURT OF THE UNITED STATES

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No. 155

GEORGE M. BOURQUIN,

Petitioner,

vs.

THE UNITED STATES

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CLAIMS**

MAY IT PLEASE THE COURT:

The petitioner, George M. Bourquin, respectfully prays that a writ of certiorari issue to review the proceedings and judgment of the Court of Claims in the above entitled case pending therein.

Jurisdiction

The opinions not officially reported and the judgment therein were rendered and entered June 2, 1947, and jurisdiction of this Supreme Court is invoked by virtue of the provisions of § 3 (b) of Act of February 13, 1925, as amended (28 U. S. C. § 288(b)).

The Matter Involved

The petitioner is a Federal district judge who in 1934 in receipt of a salary of \$10,000 per year, exercised the two privileges or options extended by the so-called retirement law (Act February 25, 1919, 28 U. S. C. § 375) viz: (1) to declare he "retired", and (2) to thereafter perform or refrain from regular active service on the bench if, when and to extent pleaseth him. He timely claimed the increased salary at the rate of \$15,000 per year awarded to each district judge by the new salary law (Act July 31, 1946, Public Law 567), which was denied by government, therefore he brought the suit before mentioned in the Court of Claims. A general demurrer thereto was sustained upon the grounds alleged that the said "retirement" law "violated the Constitution in no way" and that "Act July 31, 1946, does not apply to retired judges"; and the action was dismissed by the judgment sought to be reviewed herein.

Statutes Involved

Act July 31, 1946, *supra*, provides that thereafter "the following salaries shall be paid to the several judges hereinafter mentioned, in lieu of the salaries now provided by law, namely: * * * to each of the judges of the several district courts * * * at the rate of \$15,000 per year." No exception is expressed.

Act February 25, 1919, *supra*, provides (1) that any judge of a district court of the United States, qualified by age and service, may resign his office and "shall during the residue of his natural life, receive the salary which is payable at the time of his resignation," (a mere restatement of the pre-existing law); (2) that instead of resigning he "may retire upon the salary of which he is then in receipt, from regular active service on the bench, and the

President shall thereupon be authorized to appoint a successor"; and (3) that the so-called retired judge may be called upon to "perform such judicial duties" as he "may be willing to undertake."

Constitutional Reference

Article 3, § 1 of the Constitution provides that Federal judges "shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation which shall not be diminished during their continuance in office."

Errors Assigned

The Court of Claims erred, as follows:

1. In holding that Act July 31, 1946, Public Law 567, the new salary law, "does not apply to retired judges" and petitioner.

2. In resorting to construction of the plain, unambiguous, clear and unmistakable new salary law needing none, and therein giving consideration and weight to legislative history, and in imposing upon said law an implied exception of so-called retired judges and petitioner.

3. In holding Act February 25, 1919, 29 U. S. C. § 375, the so-called retirement law, is a "special reference" or "specific aspect" or consideration of the salaries of "retired" judges, "fixing the salaries" thereof, and operating as an implied exception of "retired" judges and petitioner from the grant of the new salary law.

4. In holding petitioner's exercise of the privileges or options of the so-called retirement law was an acceptance of an offer on condition therein "that he should continue to draw the salary he was receiving when he retired,"

despite the new salary law and its increase of salary of all district judges of whom petitioner is one.

5. In holding that Congress has power, and in the "retirement law exercised, to absolve judges of or from the duty to perform judicial service in the public interest imposed by Article 3, § 1 of the Constitution, and therein "violated the Constitution in no way."

6. In dismissing the action and entering judgment accordingly.

Questions Presented

1. Whether the new salary law applies to retired judges of whom petitioner is one; whether it is open to construction and legislative history to impose upon it an implied exception of "retired" judges and petitioner from it and the increase of salaries granted by it to all district judges.

2. Whether the so-called retirement law is "a special reference" or "specific aspect" or consideration of salaries of "retired" judges and "fixing" the same; whether exercise of the privileges or options of said law is acceptance of an offer on condition that "he should continue to draw the salary he was receiving when he retired" and restricting him thereto despite the subsequent new salary law and its increase of salary; whether it operates as an implied exception imposed on the new salary law to exclude "retired" judges and petitioner from the grant thereof; and whether the "retirement" law is of any *legal* effect save to conditionally authorize appointment of additional judges without permanent increase in the number thereof, and in all else futile, superfluous verbiage affecting the status and salary right of petitioner not at all.

3. Whether Congress has power to absolve a judge of or from his constitutional duty to perform judicial service

“for the benefit of the whole people”, and whether by the “retirement” law it has done so in respect to “retired” judges.

4. Whether the dismissal of the petitioner’s suit by the Court of Claims was error.

Reasons for the Writ

The scope of the new salary law, and the relation thereto and effect thereon, if any, by the so-called retirement law and Article 3, § 1 of the Constitution, present important questions of Federal law in controversy in the suit aforesaid which have not been but should be settled by the Supreme Court, it being the only constitutional court having jurisdiction thereof.

Moreover, the Court of Claims in contravention of the settled law of decisions by this Supreme Court, in name Legion, erroneously resorted to construction of the plain, unambiguous, clear and unmistakable new salary law needing none, erroneously resorted to legislative history and other rules, giving consideration and weight thereto, and in consequence imposed an implied exception where none is expressed, virtually rewrote said law, excluded petitioner from its all-inclusive scope and benefit, and adjudged he had no cause of action.

Therein, the court below so far departed from accepted and usual law and procedure that the whole calls for exercise of the Supreme Court’s power of supervision to the end that the errors below be corrected, the law settled, and the judgment below reversed. Although not representative in form, the case involves the general interests of some thirty judges and also public interest and right to an independent judiciary. And it is less motivated by desire for monetary gain than by the duty that rests upon every

judge to withstand impairment of his salary right, in behalf of an "independent judicial administration for the benefit of the whole people".

O'Donoghue v. U. S., 289 U. S. 533.

Prayer

WHEREFORE, petitioner prays the writ of certiorari be allowed and issue in due form, manner and time.

GEORGE M. BOURQUIN,

In pro per.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 155

GEORGE M. BOURQUIN,

Petitioner,

vs.

THE UNITED STATES

BRIEF FOR PETITIONER, CERTIORARI

MAY IT PLEASE THE COURT:

The opinions of the Court of Claims (R. 3) have not been reported.

Jurisdiction

Jurisdiction of this Court is invoked for that the matter and proceedings herein are within § 288(3), 28 U. S. C.

Statement

Petitioner is a Federal district judge who in 1934 exercised the two privileges or options extended by the so-called retirement law (28 U. S. C. § 375), viz: (1) to declare he "retired," and (2) thereafter to render or refrain from regular active service on the bench, if, when, and to extent

pleaseth him. His salary then \$10,000 per year, by Act July 31, 1946 (Public Law 567), in common with those of "each of the judges of the several district courts," was increased to \$15,000 per year. The government refused the increase and he brought suit in the Court of Claims, wherein defendant's demurrer was sustained on the grounds alleged that the "retirement" law is constitutional (R. 5) and that "retired" judges are not within the scope and benefit of said new salary law (R. 7). Judgment of dismissal was entered June 2, 1947 (R. 10). Hence, this petition to review and reverse said judgment.

Specification of Errors to Be Urged

1. Assigned errors 1 and 2, *supra*, p. 3, relate to the new salary law and will be urged and argued together. For brevity, their substance is (1) that the court erred in holding that the said law does not apply to retired judges; (2) that the court erred in resorting to construction of the plain, unambiguous, clear and unmistakable new salary law needing none, and in resorting to and giving consideration and weight to legislative history; and (3) that the court erred in holding the new salary law by implied exception excluded so-called "retired" judges and petitioner from its scope and benefit.

2. Assigned errors 3 and 4, *supra*, pp. 3-4, relate to the "retirement" law and will be urged and argued together. For brevity, their substance is (1) that the court erred in holding the "retirement" law is a special reference or specific aspect or consideration of salaries of "retired" judges and "fixing" the same, operating as an implied exception of said judges and petitioner from consideration at enactment of the new salary law and from its terms and grant; and (2) erred in holding petitioner's exercise of the privileges or options of the "retirement" law was acceptance

of an offer of congressional sanction of leisure, on condition that "he should continue to draw the salary he was receiving when he retired," restricting him thereto despite the new salary law.

3. Assigned error 5, *supra*, p. 4, relates to Article 3, § 1 of the Constitution, and in substance is that the court erred in holding Congress has power to absolve judges of or from the duty to render judicial service in the public interest, imposed by Article 3 aforesaid, exercised it in the "retirement" law, "and violated the Constitution in no way."

4. Assigned error 6, *supra*, p. 4, will be urged and argued that the court erred in sustaining the defense's demurrer and in entering judgment accordingly.

Summary of Argument

1

The new salary law expressly declares the increased salaries "shall be paid * * * to each of the judges of the several district courts". Petitioner is one of said judges. Said law needs no construction, and is invulnerable to legislative history—not to be consulted. No exception expressed, none is to be implied unless its proponent sustains the burden to convincingly demonstrate it by sufficient considerations of probative value. Not otherwise can the integrity of the legislative function and of statutory law be maintained.

2

The "retirement" law retires nothing. It is not a special reference or specific aspect or consideration of salaries of "retired" judges, and does not "fix" them. They were theretofore created or fixed by the old salary law, and their continuance and duration guaranteed by the Constitution.

Congress has no power over judge's salaries save to increase them, and the "retirement" law affects salaries not at all.

The only *legal* effect of said law is to conditionally provide for appointment of additional judges without permanent increase in their number. All else is futile surplusage.

"Public office is a public trust" and not an employment subject to contract, conditions, offer and acceptance, barter and trade. Congressional sanction of leisure is not a restrictive condition and offer accepted by exercise of the privileges or options of the "retirement" law. If it is, it is contra to Article 3, § 1 of the Constitution and public policy, and void.

The mere incidental reference to salary in the phrase "may retire upon the salary of which he is then in receipt" is but a precautionary, declaratory assurance that his salary will continue to be paid "without interval" and "immediately following" (Webster's definition of "on" and "upon" in like context). This was to dispel doubts in respect to the status and salary of a "retired" judge. Congress itself had doubts, and later conceiving he was like unto a resigned judge on a pension, reduced his salary, was therein upheld by the Justice Department, but annulled by this Court in *Booth's* case, 291 U. S. 351. His status, says the Court, "is the same as that of any active judge so called."

3

Article 3, § 1 of the Constitution imposes upon judges the duty of service co-extensive with the jurisdiction, authority and power of the court. In the public's interest and for its benefit, this duty cannot be absolved or barred by Congress nor ceded by the judge, nor between them bartered for congressional sanction of nonperformance.

By diminishing the jurisdiction of the court or by appointment of an additional judge his labor may be lessened but his duty not diminished.

Argument

The New Salary Law

By four corners taken, the new salary law in express, plain and unambiguous language of clear and unmistakable meaning, is a peremptory mandate that its increase of salaries "shall be paid to each of the judges of the several district courts." Both "retired" and nonretired judges are included in that category, and no more necessary to specifically name the one than the other. Had Congress intended any exception it easily could and would have said so. It needs no construction. Even as only the sick need a physician, only an ambiguous statute needs the remedy of construction. This is the cardinal of all rules. Legislative history is immaterial. Congress passes bills, not committee reports. The latter are the preliminary, transient, nebulous, tentative views of some few; the statute is the final, matured, deliberate will and judgment of the whole Congress and permanently enrolled in the book of laws. To illustrate, did the committee report say "the judges of Nevada and Idaho will not receive the proposed increase", would the court hold they were thus excluded from the all-inclusive new salary law? So, of "retired" judges, any committee report to the contrary notwithstanding.

The theretofore ambiguous status of a "retired" judge was settled in *Booth's* case, 291 U. S. 351, viz; "* * * the same as that of any active judge so called," and that the law contemplates he "shall continue so far as his age and health will permit, to perform judicial service"; and in his own district without let or hindrance, says *Maxwell's* case,

271 U. S. 674, in others, as before on assignment or call. A nonretired judge is not required to do more. The rule of no construction where none needed is necessary to maintain the integrity of the legislative function and of statutory law. The plain and clear text of the published statute, unaffected by "weasel words" discovered by prowling the legislative old lumber rooms, is the law. If on that the people cannot rely, they are in as hard case as those whose tyrant posted his edicts high above eyesight. But why labor the point? Every term it is declared and applied by this Court in decisions of name Legion of which the following are late and leading, viz.: *Packard Motor Co. v. Labor Board*, 330 U. S. —; *Utah Junk Co. v. Porter*, 328 U. S. 44; *Gemeses v. Walling*, 324 U. S. 260; *Barr v. U. S.*, 324 U. S. 83; *Osaka Line v. U. S.*, 300 U. S. 101; *Kuehner v. Bank*, 299 U. S. 449; *Helvering v. Bank*, 296 U. S. 89.

The written text prevails, not impaired by doubts and conjectures of needless construction.

This rule was ignored by the court below, and it gave much consideration and obvious weight to legislative history. It also ignored the significant fact, if that history is to be consulted, that a search of the Congressional Record discloses that during the entire consideration of the Senate bill which became the new salary law, in neither house was there a single expression, oral or written, by any member or committee that "retired" judges were not therein included. It also ignored that with exclusions in mind, the Senate bill and report expressly excluded the district judge of the Virgin Islands (later included on passage), demonstrating intent to include all others.

Expressio unius, etc.

Moreover, the legislative history to which the court below erroneously resorted, is not of the Senate bill which became the new salary law, but is of a like House bill which at no

time considered, read, debated or on passage in the House, was laid on the table *after* the House had passed the Senate bill—passed it not in “*lieu*” of its bill but in utter disregard of it and as an independent measure (92 Cong. Rec. 9697). House Bill 2181 introduced February 14, 1945 (91 Cong. Rec. 1107), report made October 29, 1945 (91 Cong. Rec. 10168), laid dormant until tabled as afore-said July 20, 1946 (92 Cong. Rec. 9697).

The court below found there was “ample and good reason” (R. 5, 6) to exclude “retired” judges from the new salary law. That is a matter of personal opinion. There is ample and good reason to include them.

At the time of passage, every member knew the effect of the *Booth* and *Maxwell* cases, knew that judges of the privilege in no sense were retired but active, knew that most of them continued to render good service and some of them well-nigh as extensive as before, knew that all of them constitute a valuable reserve, a stand-by plant, to serve emergency, and knew they stood on a plane of equality with judges not privileged. In consequence, between the “retired” judge and the nonretired, between him of 20 years’ service who “retired” yesterday and him of 10 years’ service who “retired” the morrow, Congress saw no good reason to and did not differentiate. Equal in status, of like service in the same court, of like ethical restraint from active business and like statutory prohibition of practice of law, of like station of eminence, prestige, dignity, respect and honor to maintain, of like solicitude for offspring if only to confirm Solomon’s wisdom that “A good man prepareth an inheritance for his grandchildren,” in the judgment of Congress they were equal in merit and need, and that the increase of salary was as reasonable, necessary, appropriate and just for the one as for the other.

The policy of the era is to increase wages, salaries, subsidies, pensions and a variety of gratuitous allowances, to

cope with the rising tide of prices and costs which threatens disaster to the standard of living and the general welfare; and with this, the increase of salaries to judges of which plaintiff is one, is consistent and without any taint of absurdity.

It is emphasized that for more than 20 years the Judicial Code employs the comprehensive word "judge" to designate all judges in every respect of jurisdiction, duty, salary and all else. That thereby judges who have exercised the privileges or options are included is beyond question. Why then contend that for the very first time this long-honored all-inclusive word "judge," excludes judges of the privilege? To do so destroys legislative consistency and statutory harmony—"sweet bells jangled out of tune," and is without support in reason and principle.

The "Retirement" Law

It is a misnomer. It retires nothing.

Its object was additional judges, at a time when Congress was loath to permanently increase their number, by the device of pseudo retirement advanced by ex-president Taft and various members of the American Bar Association. And that is the only *legal* effect of the law. In all else it is futile surplusage. A qualified judge announces "I retire," whereupon another judge is appointed to share the work. Thereafter, the "retired" judge, whose status and all else is not a whit changed, may exercise the other privilege or option, by rendering or refraining from "regular active service on the bench," if, when, and to extent pleaseth him, with congressional sanction at least. The court below held this sanction is constitutional, which is clearly error. Imposed by the Constitution as a public right and benefit, the duty of service is beyond congressional power to absolve. Moreover, the judge cannot cede or trade

it for a congressional consideration. The law is not a "specific aspect or consideration" of salaries of "retired" judges, operating as an implied exception of said judges from the new salary law. Salaries were not an objective of the "retirement" law. They then existed as the creation of the old salary law, and continuance and duration were guaranteed by the Constitution. Hence, the "retirement" law is not a "fixing" of salaries, nor a restrictive "condition" offered and accepted by "retirement," as held by the court below (R. 4-5). So far as effect upon salaries is concerned, the words that "retirement" will be "upon the salary of which he is then in receipt," are useless, futile surplusage. Congress has no power over a judge's salary but to increase it. The presumption is, even if sometime violent, that Congress knows the limits of its power and means to keep within them. The purpose of the above words anent salary was not to create or fix or continue or restrict salaries theretofore created and in continuance, but to dispel doubts as explained in 2 of the Summary of Argument, *supra*, pp. 11-12. The said words could serve no other purpose. With or without them, the law is the same, viz.: "may retire from regular active service on the bench, subject to any future legislation."

Intermediate "retirement" and the new salary law, if the judge was constrained to sue for his salary he would perforce count upon the old salary law, because it and not the retirement law established or "fixed" his salary. And if no constitutional guarantee and the new salary law reduced salaries, would the "retirement" law protect him? Clearly not. Therefore, it is clear the "retirement" law is not a "specific aspect or consideration" of salaries of retired judges as held by the court below, and so does not serve to invoke the principle by the court applied to impose an implied exception to exclude "retired" judges from the new salary law and its grant of increased salaries.

The objective of the "retirement" law is appointment of additional judges, by "retirement" of the elder to open the door to the younger, and the objective of the new salary law is increased salaries to meet the rising tide of prices and costs and to induce the abler of the bar to enter judicial service. They are not in conflict. They stand together, each operative in its own domain, and without necessity that the former should be repealed by the latter if "retired" judges are to be included in the latter's scope and grant. The court below held otherwise, and erroneously. The retirement law is merely this: The judge declares he retires, thereupon the President appoints another judge to share the work or service, and thereafter if the "retired" judge chooses to refrain from regular active service on the bench and also wholly evade his duty, Congress agrees it will ignore his default.

This is the totality of its legal effect, and it affords no basis for the implied exception found by the court below.

Defense Below, Naval Cases

Fulmer v. U. S., 32 Ct. Claims 112, relied upon by the defense in the Court below, may be by it cited here. If so, note it is radically different from the case at bar. The naval position involved is more an employment than an office. Be that as it may, Congress has plenary power to fix, reduce, or deny pay, to hire and fire, suspend, retire, demote, or remove the incumbent, and to abolish the position. The incumbent retired is without authority or power to function, is inactive and in effect is an ex-officer in all but label. Like Othello, his occupation's gone. The retirement statute could and did fix his pay and another statute prohibited any increase. Were he forced to sue for his pay, he would perforce count on the retirement law and not on the general pay law. His retirement was actual.

Now look you, none, *none* of these particulars of the status of a retired naval officer has a parallel in the status of a judge of the privilege. Of course the *retired* naval officer is not within a statute increasing the salaries of *officers*. The court's opinion that he is not is right, whether or not the reasoning and reason be likewise.

Constitution, Article 3, Section 1

The Constitution provides for courts and judges to serve the interests, rights and benefit of the public. By it in that behalf is imposed a duty to perform judicial service "as far as his age and health permit," upon every judge, a duty created by the Constitution and not by Congress. It goes without saying that rights conferred and duties imposed by the Constitution are beyond congressional power to impair. None such is granted it by the Constitution. Congress may lighten judicial labor only (1) by diminishing the jurisdiction of the Court, and (2) by creating another judge to share the work. And this latter was the object and the *legal* effect of the "retirement" law.

In either case the labor is lessened, but the duty of the judge is not diminished. Moreover, the duty can not be the subject of barter.

If congressional sanction of leisure is a condition and offer, acceptance of which by "retirement" deprives the public of its right and absolves the judge of or from his duty, as held by the Court below, it is unconstitutional and void.

"Public office is a public trust," and not an employment subject to contract, conditions, offer and acceptance, barter and trade. If the condition, offer, acceptance and agreement of "retirement" rise to this bad eminence, they are void and serve not as an implied exception of "retired" judges and petitioner from the new salary law. The condition fails, though in all else the law may stand.

Disimissal and Judgment

Nothing needs be added to the foregoing argument to demonstrate that the court below erred in dismissing the suit and entering judgment for defendant.

Conclusion

In the last analysis the case can be summed up in an irrefutable syllogism, as follows: First, the new salary law directs that "to each of the judges of the several district courts" shall be paid a salary "at the rate of \$15,000 per year." Second, plaintiff is a judge of one of said courts. Ergo, plaintiff is entitled to be paid at the rate of \$15,000 per year. He is entitled to judgment. That is the whole matter, the Alpha and the Omega, the law and the prophets.

Respectfully submitted,

GEORGE M. BOURQUIN,

In pro per.

(1316)

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 154

ALEXANDER AKERMAN, PETITIONER

v.

THE UNITED STATES

No. 155

GEORGE M. BOURQUIN, PETITIONER

v.

THE UNITED STATES

*ON PETITIONS FOR WRITS OF CERTIORARI
TO THE COURT OF CLAIMS*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (A. R. 6-12; B. R. 3-10)¹ has not yet been reported.

¹ The record in Judge Akerman's case, No. 154, is referred to as "A. R."; that in Judge Bourquin's case, No. 155, as "B. R."

JURISDICTION

The judgments of the Court of Claims were entered on June 2, 1947 (A. R. 13; B. R. 10). The petitions for writs of certiorari were filed on June 26, 1947. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTION PRESENTED

Whether petitioners, who had retired as United States District Judges prior to July 31, 1946, are entitled to be paid at the rate of \$15,000 per year, as provided by the Act of July 31, 1946, for "each of the judges of the several district courts" when the judges' retirement act provides for payment to a retired judge of "the salary of which he is * * * in receipt" at the time of retirement, and when the salary received at that time was \$10,000 a year.

STATUTES INVOLVED

The pertinent provisions of the statutes involved are set forth in Appendix A, *infra*, pp. 16-21.

STATEMENT

Both cases involve the same question, and were heard and decided together by the Court of Claims on demurrers to the petitions.

The petitioner Akerman alleged that on February 15, 1929, after having been appointed by the President of the United States and confirmed by the Senate, he was duly commissioned as United

States District Judge for the Southern District of Florida (A. R. 1). He thereupon entered into the discharge of the duties of such District Judge and continued to perform these duties until October 1939 (A. R. 1). At that time, having attained the age of seventy years, he elected to retire from regular active service on the bench, pursuant to the provisions of Section 260 of the Judicial Code, 28 U. S. C. 375, Appendix A, *infra*, pp. 20-21 (A. R. 1). At the time of his retirement, petitioner was in receipt of an annual salary of \$10,000 (A. R. 4). Subsequent both to his retirement and to July 31, 1946, he has actively served on the bench on numerous occasions and in various districts. Accordingly, the petitioner Akerman, claiming that he was a "judge" within the meaning of the Act of July 31, 1946, Appendix A, *infra*, pp. 16-17, by which Congress had increased the compensation to be paid to "each of the judges of the several district courts" from \$10,000 to \$15,000 per year, sought judgment in the amount of \$3,333.32, less lawful withholding tax, which is the additional compensation allegedly due him from August 1, 1946, to March 1, 1947, under that Act.

The petitioner Bourquin alleged that in March 1912, when he was 49 years of age, he was duly appointed to and installed in the office of United States District Judge in and for the District of Montana (B. R. 1); that in May 1934, he elected to retire under the provisions of the Act of February 25, 1919 (28 U. S. C. 375), and duly

notified the defendant thereof (B. R. 1); that since March 1912, he has been and now is in occupancy of the office of Judge of the United States District Court in and for the District of Montana (B. R. 1); that prior to and on July 31, 1946, all district judges were in receipt of salary provided by law at the rate of \$10,000 per year (B. R. 1); that on July 31, 1946, a statute was enacted which provides that thereafter there shall be paid to each of the judges of the several district courts a salary at the rate of \$15,000 per year in lieu of the salary then paid (B. R. 1-2); that the defendant has refused to pay him the increase in salary so provided, despite his protests and demands (B. R. 2); and that there is due and owing to him, from August 1946 to March 1947, inclusive, the amount of \$2,916 (B. R. 2).

The Court of Claims sustained the demurrers and dismissed the petitions (A. R. 13; B. R. 10), holding that the Act of 1946 did not operate to increase the salaries paid to judges who had retired or resigned (A. R. 6-10; B. R. 3-7). Judge Madden dissented (A. R. 10-12; B. R. 7-10).

ARGUMENT

Petitioners' contentions that they are entitled to be compensated in accordance with the Act of July 31, 1946, Appendix A, *infra*, pp. 16-17, are based primarily on the decision of this Court in *Booth v. United States*, 291 U. S. 339. There Congress had attempted as a part of a general economy

program, to apply a 15 per cent reduction to the salaries of retired judges. This Court held that judges who had retired nevertheless continued in office and were judges within the meaning of Section 1 of Article III of the Constitution forbidding the diminution of the compensation of judges during their continuance in office, and that the Act there considered could not constitutionally be applied to them. Claiming a conflict with this decision, petitioner argues that the Act of July 31, increasing the salaries paid "to each of the judges of the several district courts" plainly and unambiguously includes retired district judges and that therefore the court below erred in resorting to aids of interpretation (A. Pet. 6-7; B. Pet. 13-16). In any event, petitioners contend that the court below improperly relied upon the House Committee Report on a House bill (H. Rep. 1162, 79th Cong., 1st sess., on H. R. 2181), which was an identical companion bill to S. 920 which became the Act of July 31, 1946 (A. Pet. 7; B. Pet. 14-15). We submit that these contentions lack substance and that the court below properly dismissed petitioners' complaints.

1. The holding of the Court of Claims that retired district judges are not entitled to the increased compensation under the Act of July 31, 1946, is not in conflict with the *Booth* case. That case was concerned only with the constitutional prohibition against the diminution of judges' salaries during their continuance in office,

and held that a judge who had retired had not thereby relinquished his office and remained a "judge" protected by that constitutional provision. There is no constitutional question of diminution involved in the present case (cf. *O'Malley v. Woodrough*, 307 U. S. 277), since Congress in the 1946 Act increased, rather than attempted to decrease, the salaries of judges.² Petitioners do not contend that Congress could not increase the salaries paid active judges without simultaneously increasing the compensation of retired judges. The narrow question here presented therefore, is whether Congress in increasing the salaries to be paid to active judges by the 1946 Act intended at the same time to increase the salaries paid to retired judges. This is purely a question of statutory construction, to be resolved from the language of the Act itself, and, to the extent that the language is unclear, from the nature and purpose of the Act as manifested by the relevant legislative materials.

2. Looking only to the language of the 1946 Act, we believe that it shows on its face that the provision here involved was intended to amend Section 2 of the Judicial Code only and not Section 260, and therefore did not operate to increase the salaries of retired judges. Section 2 provides for the salary to be paid to "each of the district judges" and prior to the 1946 Act fixed

² Judge Bourquin states (B. Pet. 17) that "Congress has no power over a judge's salary but to increase it."

that salary at the specific amount of \$10,000; Section 260, on the other hand, sets no specific amount as the salary of a retired judge, and merely provides that he is to receive as compensation "the salary of which he is * * * in receipt" at the time of his retirement. The Act of July 31, 1946, provides that the specific amount of \$15,000 is to be paid as salary to "each of the judges of the several district courts." Thus the Act of July 31, 1946, follows Section 2 in setting a specific salary and enumerating the judges covered. As Section 260 is totally dissimilar, this parallelism between the 1946 Act and Section 2 plainly demonstrates that the clause of the 1946 Act here involved was intended to amend only Section 2, and not Section 260. If the Act on its face means anything, we think it has the meaning ascribed to it by the Court of Claims rather than the meaning for which petitioners contend.

3. But that very conflict between the parties as to the purport and effect of the statutory language serves to undermine the further contention of petitioners that the 1946 Act is so plain and unambiguous as to preclude resort to legislative materials. Cf. *United States v. Dickerson*, 310 U. S. 554, 562.

(a) An examination of the various statutory provisions dealing with federal judges reveals that Congress has not always used the term "judge" to include retired judges, and that to construe the term "judge" always to include retired judges

will frequently lead to results at variance with accepted fact. Thus, Section 215 of the Judicial Code, 28 U. S. C. 321, Appendix A, *infra*, p. 19, fixes the number of Justices of this Court at nine, a Chief Justice and eight Associate Justices. That this includes only the active Justices and not those who have retired has been accepted without question, basically because the President is authorized upon the retirement of a Justice of this Court to appoint his "successor." 28 U. S. C. 375a, Appendix A, *infra*, p. 21. This authority to appoint the successor to a Justice who has retired makes it plain that it was not intended that a retired Justice be considered a "Justice" within the meaning of Section 215.

Similarly, the number of judges in each of the various circuit courts of appeals and in each of the various district courts is specifically provided for in Sections 1 and 118 of the Judicial Code, 28 U. S. C. 1, 213, Appendix A, *infra*, pp. 18-19. In the Southern District of Florida, to which the petitioner Akerman was appointed and from which he retired (A. R. 1), the appointment of three district judges is authorized. Jud. Code § 1, 28 U. S. C. 1. Two district judges are authorized for the District of Montana, where the petitioner Bourquin was appointed and from which he in turn retired. *Ibid.* Yet by Section 260 of the Judicial Code, 28 U. S. C. 375, Appendix A, *infra*, pp. 20-21, the President is also authorized to appoint the successor to a retired judge immedi-

ately upon his retirement, but is not permitted thereafter to fill the vacancy created if the retired judge should die after the appointment of his successor. Obviously, for the purpose of these provisions, a retired judge is not a "judge" as the term is used in Sections 1 and 118 of the Judicial Code.

(b) There is an additional indication that Congress did not regard a retired judge in the same category as other judges. A retired judge may have his residence wherever he pleases (Act of February 11, 1938, c. 23, 52 Stat. 28; 28 U. S. C. 402, Appendix A, *infra*, p. 18), whereas every district judge is required to reside in the district or one of the districts for which he is appointed (Section 1 of the Judicial Code, 28 U. S. C. 1). Similarly, a Justice of this Court is expressly authorized to sit, other than on the Supreme Court, only as a judge of the circuit court of appeals of his circuit (Judicial Code, Sec. 120, 28 U. S. C. 216, Appendix A, *infra*, p. 19). But a retired Justice is authorized to perform any judicial duties in any judicial circuit, including the duties of a district judge (28 U. S. C. 375a; 28 U. S. C., Supp. V, 375f).³

³ Thus the late Mr. Justice Van Devanter, after his retirement, sat as a district judge for the trial of criminal cases. See *United States v. Moore*, 101 F. 2d 56 (C. C. A. 2), certiorari denied, 306 U. S. 664; *United States v. Graham*, 102 F. 2d 436 (C. C. A. 2), certiorari denied, 307 U. S. 643. But other Justices of this Court who have sat on circuit in recent years sat as circuit justices, either as a member of the circuit

(c) Finally, as we have already pointed out above, pp. 6-7, the salaries of retired judges are fixed in Section 260 of the Judicial Code (28 U. S. C. 375), which is separate and distinct from the statute fixing the salaries of other judges (Section 2 of the Judicial Code, 28 U. S. C. 5, Appendix A, *infra*, pp. 18-19).

4. The decision below is further supported by the consistent administrative and legislative construction of the last previous enactment which authorized increased pay for members of the federal judiciary. This was the Act of December 13, 1926, c. 6, 44 Stat. 919, Appendix A, *infra*, pp. 16-17, which increased the salaries of district judges from \$7,500 to \$10,000, and which except for the differences in amounts is virtually identical with the Act of July 31, 1946.

(a) It was the consistent practice of the Department of Justice, which until 1939 was charged with the administration of all matters pertaining

court of appeals on the hearing of an appeal (*Wire Wheel Corp. v. Budd Wheel Co.*, 288 Fed. 308 (C. C. A. 4) (Taft, C. J.); *United States v. Manton*, 107 F. 2d 834 (C. C. A. 2), certiorari denied, 309 U. S. 664 (Stone, J.); *Baker v. Commissioner of Internal Revenue*, 149 F. 2d 342 (C. C. A. 4) (Stone, C. J.)), or as a member of the circuit court of appeals in connection with an application for bail (*United States v. Motlow*, 10 F. 2d 657 (C. C. A. 7) (Butler, J)), or as the senior member of a district court of three judges convened pursuant to Jud. Code § 266 (*Lindsey v. Allen*, 269 Fed. 656 (D. Mass.) (Holmes, J.); *Pearl Assurance Co. v. Harrington*, 38 F. Supp. 411 (D. Mass.), affirmed, 313 U. S. 549 (Frankfurter, J.)).

to judicial salaries,⁴ to pay to judges who had retired prior to December 13, 1926, only \$7,500 per annum, and not \$10,000—although the latter was the figure to which the salary of “each of the district judges” was increased by the 1926 Act.⁵ The attached correspondence between Circuit Judge Denison of the Sixth Circuit and Assistant Attorney General Marshall, in regard to submitting a supplemental budget estimate for an increase in salaries for retired judges, shows that it was understood in 1927 that the 1926 Act did not increase the salaries of such judges and that additional legislation would be necessary to bring the salaries of the retired judges up to the recently raised level of the active judges (Appendix B, *infra*, pp. 22-26).

(b) This consistent administrative practice was reflected in the language of the various appropriation acts making money available for the payment of judges' salaries under the 1926 Act, which obviously contemplated that the salaries paid retired judges were not necessarily the same as those paid active judges. These Acts typically provided money for a specified number of circuit judges at \$12,500, for a specified number of dis-

⁴ See Sections 5 and 6 of the Act of August 7, 1939, c. 501, 53 Stat. 1223, 1226, transferring these functions to the Administrative Office of United States Courts.

⁵ It appears that by the time the Administrative Office of United States Courts took over the payment of judges' salaries, all of the judges who had retired prior to the Act of December 13, 1926, had died.

trict judges at \$10,000, and for the salaries of "judges retired under section 260 of the Judicial Code, as amended by the Act of February 25, 1919 (U. S. C., p. 908, sec. 375)." E. g., 45 Stat. 79; 45 Stat. 1110; 46 Stat. 188; 46 Stat. 1323-1324; 47 Stat. 490. In none of these Acts was any mention made of the 1926 Act as amending Section 260.

It follows that Congress, by following so closely in the 1946 Act the form and language of the 1926 Act, must be taken to have adopted the consistent administrative and legislative interpretation of the earlier measure. Cf. *National Lead Co. v. United States*, 252 U. S. 140, 146-147; *Murphy Oil Co. v. Burnet*, 287 U. S. 299, 302-303. The necessary consequence is that the 1946 Act did not increase the salaries of the retired judges.

5. An examination of the legislative history of the 1946 Act itself necessarily requires the same conclusion.

(a) S. 920, 79th Cong., which became the Act of July 31, 1946, was introduced in the Senate on April 24, 1945 (91 Cong. Rec. 3707). It was favorably reported on June 28, 1946 (92 Cong. Rec. 7784; see S. Rep. 1631, 79th Cong., 2d sess.). S. 920 as introduced was identical with H. R. 2181, which had been earlier introduced (February 14, 1945; 91 Cong. Rec. 1107) and earlier reported (October 29, 1945; 91 Cong. Rec. 10168; see H. Rep. 1162, 79th Cong., 1st sess.).

S. 920 passed the Senate on July 17, 1946, with amendments not material here.⁶ Three days later, on July 20, the Chairman of the House Judiciary Committee moved to take up the Senate bill.⁷ S. 920 was accordingly passed by the House, and the companion House bill was laid on the table. 92 Cong. Rec. 9570.

(b) In the Senate report on the bill, it was noted that "on the basis of 284 judgeships * * * the additional annual gross expenditure would be \$1,420,000" (S. Rep. 1631, *supra*, at p. 2). Similarly, the House report indicated that 284 judgeships would be involved, listing them (H. Rep. 1162, *supra*, p. 12, n. 31). The figure of 284 covered only the active judges, and did not include the retired judges. Indeed, the House report, after listing the judgeships involved,⁸ goes on to state specifically that (p. 12, n. 31):

Retired and resigned judges will not receive the proposed salary increase. The statutes provide that such judges shall receive the salary payable at the time of retirement or resignation. (28 U. S. C. secs. 375, 375a, 375d (1940)).

⁶ The judges of the Tax Court and the judge of the District Court of the Virgin Islands were included in the measure under amendments offered on the floor. 92 Cong. Rec. 9188.

⁷ He had earlier, on July 18, failed to obtain consent for immediate consideration of the Senate bill. 92 Cong. Rec. 9388.

⁸ It is significant that this Report, filed on October 29, 1945, lists "Nine Justices of the Supreme Court." P. 12, n. 31. As of that time there were three retired Justices, Hughes, C. J., McReynolds and Roberts, JJ., in addition to the nine sitting Justices.

(c) It is perfectly obvious that S. 920 and H. R. 2181 were the same legislative proposal. They were *in haec verba*, the discussion in the House shows that the members considered the two bills to be the same (92 Cong. Rec. 9571, 9572), and the index to the Congressional Record, under "History of Bills and Resolutions", confirms the general understanding that S. 920 passed the House "in lieu of" H. R. 2181. That being so, it is difficult to follow the insistence in the dissenting opinion and in the petitions (A. Pet. 7; B. Pet. 14-15) that the court below was not justified in looking to the House Report on the companion bill.

It is a commonplace that this Court will look to the legislative history of other bills in order to ascertain the meaning of the enactment before them.⁹ "When aid to construction of the meanings of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *United States v. American Trucking Ass'ns*, 310 U. S. 534, 543-544. "The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction." *United States v. Dickerson*, 310 U. S. 554, 562. To contend, as petitioners do, that a court may

⁹ E. g., *United States v. Missouri Pacific Ry. Co.*, 278 U. S. 269, 278, 279; *American Stevedores v. Porello*, No. 69, Oct. T. 1946, decided March 10, 1947, pp. 3-6 of slip opinion.

not look to the committee report on an identical bill simply because of the legislative accident that the companion bill in the other house was the one finally enacted into law, is to espouse a contention that is wholly unrealistic and in consequence utterly untenable.¹⁰

CONCLUSION

The decision below is clearly correct, there is no conflict with any applicable decision of this Court, and the question does not warrant further review. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

PEYTON FORD,
Assistant Attorney General.

FREDERICK BERNAYS WIENER,
Special Assistant to the Attorney General.

PAUL A. SWEENEY,
MELVIN RICHTER,
Attorneys.

AUGUST 1947.

¹⁰ It may well be, as the dissenting judge says (A. R. 12; B. R. 10), that "The Act was largely a cost of living increase in salary, and the need of the retired judges for the increase was the same as that of the active judges." But those are considerations to be addressed to the Congress.

APPENDIX A

STATUTES INVOLVED

1. The Act of July 31, 1946, Pub. Law 567, c. 704, 79th Cong., 2nd sess., provides:

SEC. 1. The following salaries shall be paid to the several judges hereinafter mentioned in lieu of the salaries now provided by law, namely:

To the Chief Justice of the United States at the rate of \$25,500 per year.

To each of the Associate Justices of the Supreme Court of the United States at the rate of \$25,000 per year.

To each of the judges of the several circuit courts of appeals, including the chief justice and the associate justices of the United States Court of Appeals for the District of Columbia, at the rate of \$17,500 per year.

To the presiding judge of the United States Court of Customs and Patent Appeals, and to each of the associate judges thereof, at the rate of \$17,500 per year.

To the chief justice of the Court of Claims, and to each of the judges thereof, at the rate of \$17,500 per year.

To each of the judges of the several district courts, including the associate justices of the District Court of the United States for the District of Columbia and the judges in Puerto Rico, Hawaii, the Virgin Islands, and Alaska exercising Federal Jurisdiction, at the rate of \$15,000 per year.

To the chief justice of the District Court of the United States for the District of Columbia at the rate of \$15,500 per year.

To each of the judges of the United

States Customs Court at the rate of \$15,000 per year.

To each of the Judges of The Tax Court of the United States at the rate of \$15,000 per year.

That all of said salaries shall be paid in monthly installments.

SEC. 2. It is authorized that there be appropriated annually such sums as are necessary to carry out the provisions of this Act.

2. The Act of December 13, 1926, c. 6, 44 Stat. 919, provides:

SEC. 1. The following salaries shall be paid to the several judges hereinafter mentioned in lieu of the salaries now provided by law, namely:

To the Chief Justice of the Supreme Court of the United States the sum of \$20,500 per year, and to each of the Associate Justices thereof the sum of \$20,000 per year.

To each of the circuit judges the sum of \$12,500 per year.

To each of the district judges the sum of \$10,000 per year.

To the presiding judge of the United States Court of Customs Appeals, and to each of the other judges thereof, the sum of \$12,500 per year.

To the Chief Justice of the Court of Appeals of the District of Columbia, and to each of the associate justices thereof, the sum of \$12,500 per year.

To the Chief Justice of the Court of Claims, and to each of the other judges thereof, the sum of \$12,500 per year.

To the Chief Justice of the Supreme Court of the District of Columbia, \$10,500 per year, and to each of the associate

justices thereof the sum of \$10,000 per year.

To each of the members of the Board of General Appraisers, which board functions as the customs trial court, the sum of \$10,000 per year.

That all of said salaries shall be paid in monthly installments.

Sec. 2. This Act shall take effect on the first day of the first month next following its approval.

3. The Act of February 11, 1938, c. 23, 52 Stat. 28 (28 U. S. C. 402) provides:

No provision of law requiring any judge of any court of the United States to reside in any district or circuit shall be held or considered to apply to any such judge after he shall have retired.

4. Section 1 of the Judicial Code, 28 U. S. C. 1, provides in part:

In each of the districts described in chapter five of this title there shall be a court called a district court, for which there shall be appointed one judge, to be called a district judge, except that in * * * the District of Montana * * * there shall be an additional district judge * * *; * * * in the Southern District of Florida, * * * there shall be two additional judges * * *.

Every district judge shall reside in the district or one of the districts for which he is appointed, and for offending against this provision shall be deemed guilty of a high misdemeanor.

5. Section 2 of the Judicial Code, 28 U. S. C. 5, provides:

Each of the district judges, including the judges in Puerto Rico, Hawaii, and Alaska exercising Federal jurisdiction, shall receive a salary of \$10,000 a year, to be paid in monthly installments.

6. Section 118 of the Judicial Code, 28 U. S. C. 213, provides in part:

There shall be in the first and fourth circuits, respectively, three circuit judges; in the tenth circuit, four circuit judges; in the third, fifth, and seventh circuits, respectively, five circuit judges; in the second and sixth circuits, respectively, six circuit judges; and in the eighth and ninth circuits, respectively, seven circuit judges, to be appointed by the President, by and with the advice and consent of the Senate. Each circuit judge shall receive a salary of \$12,500 a year, payable monthly. Each circuit judge shall reside within his circuit, and when appointed shall be a resident of the circuit for which he is appointed.

7. Section 120 of the Judicial Code, 28 U. S. C. 216, provides in part:

The Chief Justice and the associate justices of the Supreme Court assigned to each circuit, and the several district judges within each circuit, shall be competent to sit as judges of the circuit court of appeals within their respective circuits.

8. Section 215 of the Judicial Code, 28 U. S. C. 321, provides:

The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight Associate Justices, any six of whom shall constitute a quorum.

9. Section 260 of the Judicial Code, as amended, 28 U. S. C. 375, Supp. V, provides in part:

When any judge of any court of the United States, appointed to hold his office during good behavior, resigns his office after having held a commission or commissions as judge of any such court or courts at least ten years, continuously or otherwise, and having attained the age of seventy years, he shall, during the residue of his natural life, receive the salary which is payable at the time of his resignation for the office that he held at the time of his resignation. But, instead of resigning, any judge other than a Justice of the Supreme Court, who is qualified to resign under the foregoing provisions, may retire, upon the salary of which he is then in receipt, from regular active service on the bench, and the President shall thereupon be authorized to appoint a successor; but a judge so retiring may nevertheless be called upon by the senior circuit judge or judicial council of that circuit and be by such senior circuit judge or such council authorized to perform such judicial duties in such circuit as such retired judge may be willing to undertake, or he may be called upon by the Chief Justice and be by him authorized to perform such judicial duties in any other circuit as such retired judge may be willing to undertake or he may be called upon either by the presiding judge or senior judge of any other such court and be by him authorized to perform such judicial duties in such court as such retired judge may be willing to undertake. Any judge who has heretofore retired, or who hereafter retires, under the provisions of this section, may perform judicial duties only when so called and

authorized as herein provided, or as provided by section 17-20, 22, and 23 of this title.

* * * * *

Upon the death, resignation, or retirement of any circuit or district judge, so entitled to resign, following the appointment of any additional judge as provided in this section, the vacancy caused by such death, resignation, or retirement of the said judge so entitled to resign shall not be filled.

10. 28 U. S. C. 375a provides:

Justices of the Supreme Court are hereby granted the same rights and privileges with regard to retiring, instead of resigning, granted to judges other than Justices of the Supreme Court by section 375 of this title, and the President shall be authorized to appoint a successor to any such Justice of the Supreme Court so retiring from regular active service on the bench, but such Justice of the Supreme Court so retired may nevertheless be called upon by the Chief Justice and be by him authorized to perform such judicial duties, in any judicial circuit, including those of a circuit justice in such circuit, as such retired Justice may be willing to undertake. The term "judicial circuit" as used in this section includes the District of Columbia.

APPENDIX B

CORRESPONDENCE RELATING TO SALARIES OF RETIRED
JUDGES AFTER THE 1926 INCREASEUNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SIXTH CIRCUIT

Michigan, Ohio, Kentucky, Tennessee

Circuit Judges:

Arthur C. Denison—Grand Rapids, Mich.

Maurice H. Donahue—Columbus, Ohio.

Charles H. Moorman—Louisville, Ky.

CHAMBERS OF JUDGE DENISON,
Grand Rapids, Mich., October 22, 1927.

HONORABLE JOHN MARSHALL,
Assistant Attorney General,
Washington, D. C.

DEAR MR. MARSHALL: I duly received yours of the 7th, giving me the list which I had requested of "resigned and retired judges" and I thank you for the trouble in getting it up.

I find two inaccuracies with reference to the distinction between the judges who have resigned and those who have retired. It seems that Circuit Judge Ward retired under amended provisions in June, 1921; but in 1924 he resigned and has not since then done any judicial work nor been eligible. District Judge Sater did not retire but absolutely resigned in November, 1924, and has since done no judicial work. In fact, he is in active practice before our court and other courts. This leaves among those judges who had retired before January 1st, 1927 and

so are not receiving the advance in salary, Circuit Judges Knappen, Ross and Morrow and District Judge Hale. For your information and in connection with a matter which I wish to bring up in the most effective way, I add the following data:

Judge Knappen, age 73, retired Apr., 1924, after having served 18 yrs.

Judge Hale, age 79, retired Jan., 1922, after having served 19 yrs.

Judge Morrow, age 84, retired Jan., 1923, after having served 31 yrs.

Judge Ross, age 82, retired May, 1925, after having served 40 yrs.

I know that Judge Knappen has continued quite actively at work ever since his retirement and has sat with us in the Court of Appeals at nearly every one of the monthly sessions during the three years, although in about half as many cases as the rest of us. I have understood that Judge Hale has done a substantial amount of work every year; I do not know how much. I have no personal knowledge as to Judges Morrow and Ross.

The Chief Justice expressed a willingness, or indeed desire, to present to Congress in the proper way, a request that Judge Knappen's retirement salary be put at the same figure it would be if he had held on a little longer. The Chief Justice assumed that Judge Hale would be in the same class; and whether he would think it wise to make a special request for these two or include all four, I do not know. I am sending him the data with the suggestion that it may

be advisable to submit a supplementary estimate for the Budget approval before it is too late. If he should make inquiries from the Department, you will understand the situation as well as I can state it.

Sincerely,

(S) A. C. DENISON,
Circuit Judge.

DEPARTMENT OF JUSTICE
Washington, D. C.

Assistant Attorney General

NOVEMBER 1, 1927.

Honorable A. C. DENISON,
*United States Circuit Judge,
Grand Rapids, Michigan.*

MY DEAR JUDGE DENISON: Permit me to acknowledge your valued favor of October 22, 1927, in which you suggest the propriety of the Attorney General submitting a supplemental estimate to the Bureau of the Budget, providing for an increase in the salaries drawn by retired Judges Knappen, Hale, Morrow and Ross.

I have carefully looked into the matter, and it is my opinion that it will be necessary to secure new legislation before the Attorney General could with propriety submit an estimate to the Bureau of the Budget for the purpose you have suggested. Section 375 of Title 28, of the U. S. Code, provides for the retirement of a judge "upon the salary of which he is then in receipt."

The Judges to whom you refer were retired under the terms, of course, of this Act. I am sure that you will at once see that Congress must amend the Act before it can appropriate the money; unless the necessary legislation is included in the Appropriation Act itself, which is always subject to a point of order on the floor of the House.

I remain, my dear Judge, with high esteem,
Very truly yours,

JOHN MARSHALL.

UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SIXTH CIRCUIT

Michigan, Ohio, Kentucky, Tennessee

Circuit Judges:

Arthur C. Denison—Grand Rapids, Mich.

Maurice H. Donahue—Columbus, Ohio

Charles H. Moorman—Louisville, Ky.

CHAMBERS OF JUDGE DENISON,

Grand Rapids, Mich., November 4, 1927.

Hon. JOHN MARSHALL,

Assistant Attorney General,

Washington, D. C.

MY DEAR MR. MARSHALL: I have yours of November 1st regarding my suggestion for an increase in the retirement salaries for one or two of the retired judges.

I appreciate that new legislation will be necessary but I knew that this was very often inserted in the appropriation bill itself.

It is clear enough upon your statement of it

that the Department cannot submit an estimate based upon nonexistent legislation, and hence that there is no present occasion to trouble the Department about it.

I shall hope to take it up with the Judiciary Committee and get something under way.

Sincerely,

(S) A. C. DENISON,
Circuit Judge.

No. 155

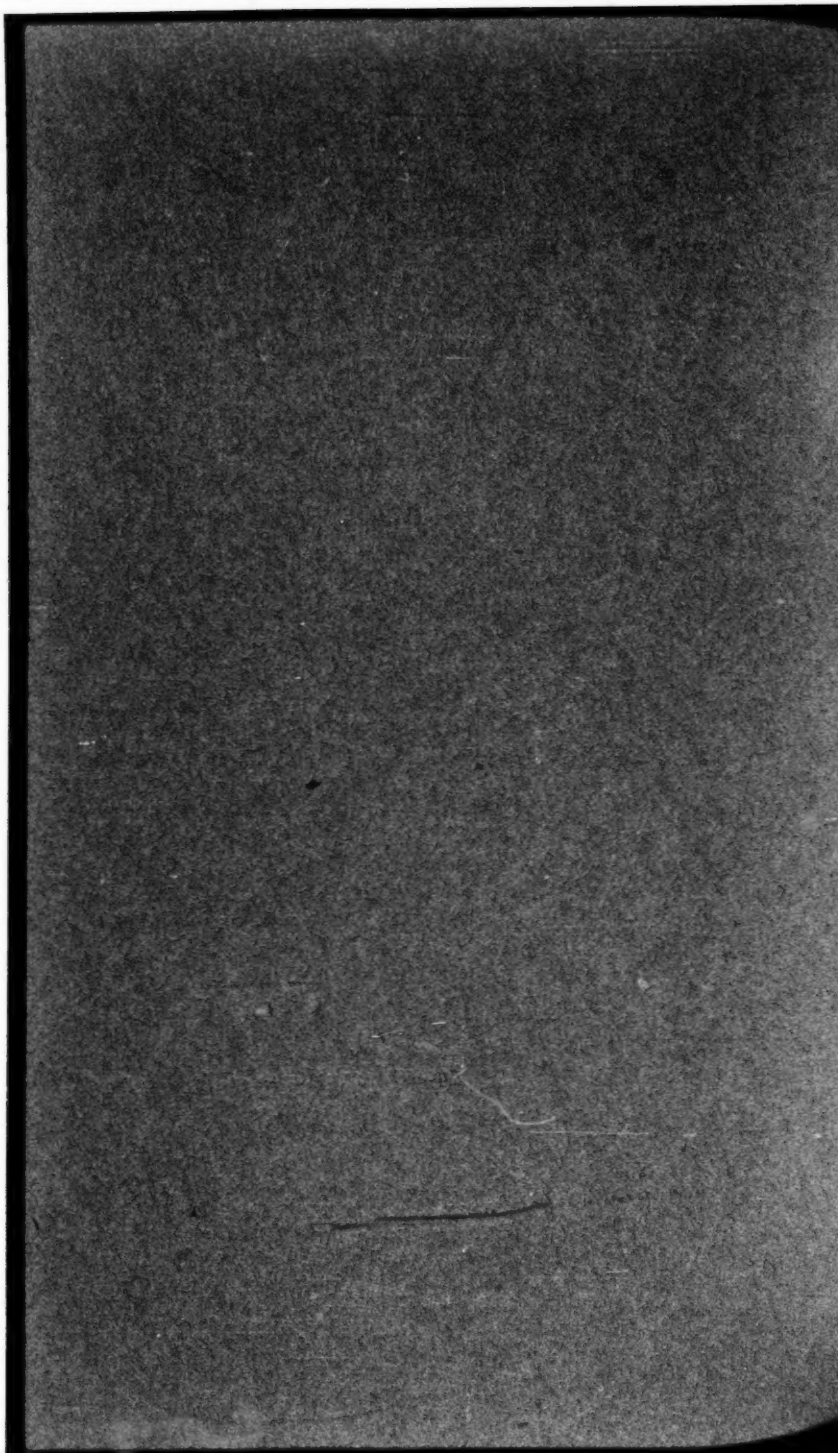
GEORGE M. BOORMAN

THE UNITED STATES

OF PETITION FOR WRIT OF HABEAS CORPUS TO THE COURT OF CLAIMS

PETITIONER'S REPLY BRIEF

+ GEORGE M. BOORMAN,
Is-Pro Per.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 155

GEORGE M. BOURQUIN,

Petitioner,

vs.

THE UNITED STATES

PETITIONER'S REPLY BRIEF

MAY IT PLEASE THE COURT:

Statement

By way of new matter, the solicitor General in his brief presents a Denison, Marshall correspondence (b. 23), and in it, the old salary law (44 Stats. 919), certain appropriation acts (b. 11), and his claim of "consistent administrative and legislative construction" of the old salary law (b. 10), he assumes to find warrant to resort to legislative history to impose upon the new salary law of July 31, 1946 (pub. Law 567), an implied exception of "retired" judges from the latter's express grant of increased salary "to each of the judges of the several district courts." The facts do not sustain his contention.

Argument

The old salary law and the new are like in language granting increased salary to each and all district judges *eo nomine*, without exception expressed. They are also like in that during consideration of the bills thereof (that of the old, very extensively debated), in neither house was there a single expression, oral or written, that "retired" judges were excluded from their all-inclusive grant. Now, contemporaneous therewith and at all times since the retirement law of 1919, Congress employed the words "judge", "district judge" and "district court" to import both "retired" and "active judges so-called" (this Court's characterization of the latter in *Booth's Case*, 291 U. S. 351, and mere labels), unless by express words it is manifest otherwise. Not an instance to the contrary exists, tho the Solicitor endeavors to find one. It is emphasized, not *one instance* of Congressional legislation to the contrary exists. Moreover, all prior legislation in relation to district judges and courts, at once applied to "retired" judges as they came into being. Proof of this appears in the Solicitor's reminder (b-9) that Act Feb. 11, 1938, 52 Stats. 28, was necessary to exclude retired district judges from the old law requiring district judges to reside in their districts.

And it is earnestly urged that this is a settled, long continued, invariable and *existing* Congressional practice and policy, controlling the construction of those words in the salary laws and disclosing their meaning and intent; and consistent with sound principle cannot be ignored and rejected for the first and only time, by implication to amend and change the clear and unambiguous new salary law, to exclude "retired" judges from its grant. In the face of it, the Solicitor's assumed "administrative and legislative construction" fades to insignificance.

That the old salary law included "retired" judges, finds further confirmation in that some few months subsequent, in order to supply monies for the increase, a deficiency act to that end, for the account of "salaries of circuit, district and retired judges", was duly enacted (45 Stats. 20).

Appropriation Bills

Adverting to the appropriation acts quoted by the Solicitor (b. 11), it would have been well to add the next paragraph, viz: "this appropriation shall be available for the salaries of all—district judges—whether active or retired."

And so far as he attaches significance and "practice" to the numbering of district judges and rate of salary in said acts, utter repudiation thereof by Congress appears in the later appropriation acts contemporaneous with the new salary law, by omission of numbering and rate, merely appropriating a lump sum for "district judges, whether retired or active." 58 Stats. 356 (1944), 59 Stats. 198 (1945).

However, appropriation acts are not permanent legislation, have no effect on existing rights, do not create policy or practice, but are mere temporary administrative authorization and direction for payment of monies owing and due. Generally, they are of data, schedules, computations, forms and language of the departments seeking appropriations.

Denison, Marshall Letters

The letters and actions of Assistant Attorney General Marshall disclose that from the beginning he was of opinion that "retired judge" and "resigned judge" are synonymous, equivalents, both ex-judges, private personages and pensioners. His letter of May 7th, 1926 (68 Cong. Rec. 169) to Representative Ramseyer, during pendency of the old salary law, is a list of "Federal judges resigned", in

which category he includes "retired" judges. Upon that theory to the then four retired judges he refused the increase of the old salary law, and upon that theory he and/or his associates in office strenuously contests Booth's Case, 291 U S.. 346,—a theory by this Court in said case rejected. Nonetheless, the shadow of that theory appears to some becloud the Solicitor's thought and brief.

Marshall's "practice" endured only to the death of the four retired judges, Judge Hale, the last, in 1934. (Fed. Rep. list of judges). With his death also died Marshall's and the Solicitor's "consistent administrative practise", of limited operation upon only four judges for different periods over a brief stretch of 7½ years.

Twelve years later is the new salary law, and the courts' Administrative Officer announced that in view of Marshall's letter to Denison, he was reluctant and averse to paying the increase to "retired" judges, until warranted by the judgment of a competent court.

A subordinate official's erroneous construction of the old salary law and his brief action upon it, do not establish a "consistent administrative and legislative construction and practice", open continuous and notorious. The plain and clear law, consistent with long settled legislative construction and public policy in regard to the meaning of words, can not thus be changed or annulled.

The plain and clear new salary law is immune to it.

Number of Judges

In the judicial Code is, of course, temporary. The number varies from time to time by appointments to new judgeships and successors to "retired" judges. It is evident the Solicitor is of opinion the "retired" judge is no longer to be enumerated, is an ex-judge (b. 7, 8).

This enumeration accurate today, inaccurate tomorrow, does not sustain the point the Solicitor would make (b. 7-9), and is immaterial.

Cases Cited by the Solicitor

Are not in point. The facts in the case at bar do not subject it to their rules. Typical of all is *U. S. vs. Am. Truck. Assoc.*, 310 U. S. 534. In that case resort is had to legislative history (1) to preserve congressional consistency in usage of words, and (2) to uphold settled public policy. In this case the Solicitor would employ it (1) to destroy the first, and (2) to overturn the last. There, the word "employees" had been of restricted construction; here, the words "district judge" had been always of general construction save when expressly restricted.

The cases as far apart as the poles.

Constitutionality of Retirement Law

The construction of the Court below impeaches it; that of Petitioner would uphold it in some part. See original brief, pages 12, 18, 19. Seemingly unable to sustain the former or to refute the latter, the Solicitor assumes the stance of an ostrich.

Conclusion

By reference, the paragraph concluding the original brief, is adopted here.

Respectfully submitted,

GEORGE M. BOURQUIN,
In Pro Per.